Filing # 56946643 E-Filed 05/25/2017 03:41:35 PM

RECEIVED, 05/25/2017 03:43:29 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD CRIMINAL JURY INSTRUCTIONS IN CAPITAL CASES
_____/

CASE NO: SC17-583

COMMENTS OF THE HONORABLE HOWARD L. "REX" DIMMIG, II, PUBLIC DEFENDER, TENTH JUDICIAL CIRCUIT

I write today not to comment on the specific criminal jury instructions pertaining to the imposition of the death penalty which this Court has, on an interim basis, authorized for publication and use, but rather to suggest that a comprehensive re-evaluation of the standard jury instructions in capital cases be undertaken before any final instructions are authorized.

The last such comprehensive review was initiated by this Court in June, 2004 by way of a letter to the Committee on Standard Jury Instructions in Criminal Cases and the Criminal Court Steering Committee expressing concerns that "developments in the decisional law relative to capital cases may not be sufficiently reflected in the [current instructions]." Both Committees filed separate reports and proposals. This Court held the matter in abeyance pending resolution of *State v. Steele*, 921 So.2d 538 (Fla. 2005). Without detailing the events of the next several years, after *Steele* was decided, some

proposals were withdrawn and others were amended several times before some amendments to the then-existing standard instructions were finally authorized in October, 2009.

Surely it must again be said that developments in the decisional law (and statutory amendments) relative to capital cases may not be sufficiently reflected in the current, or proposed, instructions.

The rulings in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), constitute a paradigm shift in Florida's death penalty jurisprudence which necessitates a complete reassessment of the standard jury instructions. Deeply held understandings of the very structure of capital case procedures have changed. In response, changes to the structure of capital case jury instructions, not simply amendments, are required.

Beginning with *Jones v. United States*, 526 U.S. 227 (1999) progressing through *Apprendi*, and culminating in *Ring,* the United States Supreme Court came to recognize that to enforce the constitutional right to trial by jury what had been considered sentencing factors are much more. They are the functional equivalent of elements of an offense. "Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a

defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003). Consequently, in *Hurst v.* Florida, 136 S.Ct. at 619, the Court concluded that, "the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment."[1]

It necessarily followed that what had been considered a single crime of first-degree murder was in fact two separate crimes, one punishable by life imprisonment and the other possibly by death. To paraphrase the late Justice Scalia, first-degree murder *simpliciter* is properly understood as a lesser included offense of first-degree murder with additional findings. *Sattazahn*, 537 U.S. at 112.

In *Hurst v. Florida*, the United States Supreme Court ruled, at long last, that the reasoning of *Ring v. Arizona*, 536 U.S. 584 (2002), applied equally to Florida's death penalty procedures. Specifically, the Court found that after a jury found a defendant guilty of the lesser included offense of first-degree murder, Florida judges, rather than jurors, made the critical findings required to elevate the offense to the

[1] While the common understanding of a capital offense is one which is punishable by death, Florida statutes have long defined a capital offense differently. Sexual battery in violation of section 794.011(2)(a) is classified as a capital felony though not punishable by death since 1981. See Buford v. State, 403 So.2d 943 (Fla. 1981).

greater crime which may be punishable by death. In identifying what those critical findings were, the United States Supreme Court could, of course, only address those findings required by the federal constitutional right embodied in the 6th Amendment. The critical findings required under Florida constitutional and statutory law fell to this Court to determine. That determination was made in *Hurst v. State*.

You decided that in order to elevate a conviction for first-degree murder where life imprisonment without parole is the mandatory sentence to the greater offense of first-degree murder where death is the maximum penalty, the critical elements that must be found by a unanimous jury are: 1) the existence *vel non* of each aggravating factor alleged by the state, 2) that the aggravating factor (or factors) are sufficient for imposition of a sentence of death, 3) that the aggravating factor (or factors) found to exist outweigh the mitigating circumstances established, and 4) that death is the recommended sentence.

It is difficult for even highly experienced Florida attorneys and jurists to wrap their heads around the post-Ring reality that there are two separate crimes of first degree murder. This task is made more difficult because, despite recent amendments, Florida statutes fail to distinguish between those factors (elements) which define a separate criminal offense and the factors that are only appropriate for

consideration once a defendant has been convicted of that offense. Section 921.141(1), Florida Statutes (2017) continues a procedure, first adopted in 1972, that bifurcates what is a single capital murder trial into a *guilt phase* and a *penalty phase*. The standard jury instructions are similarly bifurcated. Neither separately identify those factors which have historically been considered during the *penalty phase* of the trial but now properly must be considered by the jury as the essential elements required to establish guilt of the separate and distinct offense of first degree murder with death a potential sentence. To analogize this procedure to a non-capital crime, it would be similar to bifurcating a robbery trial into a *guilt phase* where the jury considers only those elements required to prove theft, and a *penalty phase* where the jury considers whether the taking was accomplished through the use of force, violence, assault, or putting the victim in fear. The additional element does not enhance the penalty for theft. It defines a different offense.

Without explicit jury instructions, this procedure could result in jurors convicting a defendant of the wrong criminal offense. The proposed jury instructions (both those promulgated by the jury instruction committee and those authorized by this Court for use on an interim basis) exacerbate this potential for juror error by simply amending the pre-existing *penalty phase*

instructions thereby perpetuating the pre-Ring misconception that all aggravating factors are only sentencing factors.

Florida's standard jury instructions in capital cases, from the Introduction to Homicide to the final admonition to follow the law as set out in the instructions, must fully embrace our entry into the new reality of the post-Ring world. Only a comprehensive re-examination and re-writing of our jury instructions can accomplish this.

DISCLAIMER

These comments were prepared by and are submitted solely on behalf of the undersigned. They should not be considered as reflective of the position of the Florida Public Defender Association.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the Criminal Jury Instructions Committee Chair, The Honorable F. Rand Wallis, c/o Bart Schneider, Office of the General Counsel, 500 S. Duval Street, Tallahassee, Florida 32399-1925, schneidb@flcourts.org, on this 25th day of May, 2017.

/s/ Howard L. "Rex" Dimmig, II
Howard L. "Rex" Dimmig, II
Public Defender
Tenth Judicial Circuit
Florida Bar No: 0255491
P.O. Box 9000-PD
Bartow, FL 33831-9000
rdimmig@pd10.org
tlocke@pd10.org